No. 75-552

In the Supreme Court of the United States

OCTOBER TERM, 1975

THOMAS S. KLEPPE, SECRETARY OF THE INTERIOR, ET AL., PETITIONERS

v.

SIERRA CLUB, INC., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY MEMORANDUM FOR THE PETITIONERS

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1. Respondents argue that the court of appeals' decision is interlocutory, making review at this time inappropriate. As we discussed at Pet. 10, n. 12, the decision is interlocutory in the sense that the court of appeals remanded for further proceedings. We submit, however, that review in the present posture is both appropriate and necessary.

First, the decision settles all of the legal questions in the case, reserving to the district court only questions of timing, so long as the government continues to desire to approve mining in the region respondents have selected. See Pet. App. 45A-50A. Any other outcome could come about, the court held, only if "contrary to expectations" (Pet. App. 48A) the government either ceased contemplating coal development or settled upon "no role at all" (*ibid.*). Second, the decision is sufficiently "final"

that the court of appeals issued an injunction against approval of any mining plans in the Eastern Powder River Basin (Pet. App. 50A), and, at respondents' behest, a district court has issued an injunction with respect to a mining plan already approved by the Secretary of the Interior (Br. in Opp. App. 6a-7a). These injunctions demonstrate that the court of appeals' decision has considerable present effect and that it "will almost certainly lead to repeated appeals, injunctions, and threats of both over an extended period of time" (Pet. 13) unless reviewed by this Court.[1] Third, under any interpretation of the court of appeals' decision, the issues concerning the power of a court to enjoin an officer who has not yet violated NEPA (see Pet. 17-18) are ripe for decision now. Indeed, they will never be ripe at any other time.

2. Respondents assert (Br. in Opp. 22) that if the government began immediately to prepare the impact statement they contend is required "it would probably be completed as soon as, or almost as soon as, this Court reaches a decision on the merits." This assertion is incorrect. Respondents have argued (Br. in Opp. 18) that massive

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[1]The need for prompt review is enhanced by the fact that the government is now faced with inconsistent directives from different courts. As we discussed in the petition (Pet. 7), the government has declared a moratorium on the issuance of most new leases and the approval of most mining plans. The court of appeals praised this action (Pet. App. 5A-8A), indicated that it should be made absolute (*id.* at 11A-12A), called for further restraint (*id.* 51A-52A), and issued an injunction against certain federal action (*id.* at 50A). But in *American Nuclear Corp.* v. *Kleppe*, D. Wyo., No. C-74-72, appeal pending, C.A. 10, the court held that the entire moratorium is illegal because it has an adverse economic effect on mining interests and was declared without the preparation of an impact statement. The government now is under a directive from one court to defer action and from another court to go forward.

new studies are needed—studies that would take several years to plan and carry out. The *National Impact Statement*, which analyzed environmental effects in less depth than respondents apparently demand of a regional impact statement, was ordered to be prepared in June 1972, announced to the public in February 1973, and completed in September 1975, a total of more than three years.

In order to prepare a statement for the region selected by respondents, it would be necessary initially to define the extent and nature of the "proposal" before environmental analysis could begin: analysis of all possible outcomes and infinite permutations is unavailing. The *National Impact Statement* indicated, however, that coal decisions will be made mine-by-mine (or perhaps local area by local area). There is no proposal or program with respect to the Northern Great Plains (see Pet. 19-21; Pet. App. 95A, 96A, 99A-100A). The lack of a proposal that could be the subject of environmental study would complicate and extend the task of preparing the impact statement respondents seek.

Finally, the adequacy of any impact statement finally prepared for the Northern Great Plains could become the subject of a challenge in the courts. The time necessary to adjudicate such a challenge, when added to the approximately three years that the Department of the Interior estimates would be consumed by preparation of the statement itself, would create a period of delay well in excess of the time required for this Court to pass upon the issues we have presented.

3. Respondents assert (Br. in Opp. 17) that "there have been at least 29 federal coal leases issued in the [Northern Great Plains] since January 1, 1970, and not a single environmental statement has been prepared." In our view, this is irrelevant to the question presented by this case. It is, in any event, inaccurate. The Department of the In-

terior has informed us that the government has issued 14 new coal leases on public lands and 10 new coal leases on Indian lands within the Northern Great Plains since January 1, 1970. An environmental assessment (although not necessarily an impact statement) was prepared for all of these leases. The Department has previously taken the position that a full impact statement need not be prepared for a lease if one was prepared for any mining plan; no coal mining can occur under federal leases in the absence of an approved mining plan. Impact statements have been prepared prior to the approval of any mining plan. As we stated in the petition, however, it is now the policy of the government to prepare an impact statement before approving any coal lease that would have major effects upon the quality of the human environment.

In *Cady* v. *Morton*, C.A. 9, No. 74-1984, decided June 19, 1975, to which respondents refer, the government had issued a lease and approved a mining plan permitting mining on a portion of the leased lands. An impact statement had been prepared for the mining plan but not for the lease. The court of appeals directed the government to prepare an impact statement for the lease as well, but it allowed mining to continue under the approved mining plan. We believe that the court of appeals should have followed the same course here. If, contrary to our arguments, an impact statement must be prepared for the Northern Great Plains as a region, the government still should be free to proceed with respect to individual projects that have been fully analyzed in unchallenged impact statements. *Cady* indicates that the court of appeals here should have refrained from enjoining fully-analyzed federal actions.

4. As we explained in our petition and in our application for a stay, this case is of great importance to the Nation's energy needs and to the interpretation of NEPA.

Further delay in the disposition of this case, and further continuation of the court of appeals' injunction, are not warranted. The petition for a writ of certiorari should be granted and the court of appeals' injunction should be stayed.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

DECEMBER 1975.